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Legislative Fact Sheet - Environmental Covenants Act

Act Environmental Covenants Act

Origin Completed by the Uniform Law Commissioners in 2003.

Description This act provides clear rules for a perpetual real estate interest – an environmental covenant – to regulate the use of brownfields when real estate is transferred from one owner to another.

Endorsements

Enactments Alabama, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, U.S. Virgin Islands, Utah, Virginia, Washington, West Virginia

2017 Introductions New Mexico

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Environmental Covenants Act Summary

Virtually everywhere in America, state and local governments are struggling with the problem of brownfields – vacant, abandoned and underused sites with various forms and degrees of environmental contamination. Reclaiming many of these sites for beneficial uses is very difficult and very expensive. Total cleanup, if possible, would often cost much more than the market value of the property. However, if a legal mechanism can be developed for long term control of use and clean-up or remediation (the current term of art), some properties may be safely returned to use and may be bought and sold. Current real property law is inadequate. Various common-law doctrines and other legal rules often work against such long-term controls, a situation which undermines the use and marketability of contaminated property.

In 2003, the Uniform Law Commissioners have promulgated the Uniform Environmental Covenants Act to overcome the inadequate common law rules. The statutory legal mechanism it creates is called an "environmental covenant." Covenants are generally recognized in the common law as a means of conveying restrictions on use of land. The environmental covenant relies on the common law base, but re-creates it for the specific purpose of controlling the use of contaminated real estate, perpetually if necessary, while allowing that real estate to be conveyed from one person to another subject to those controls.

An environmental covenant is a specific recordable interest in the real estate. It arises from an environmental response project that imposes activity and use limitations. Such a project must arise under an appropriate federal or state program or approval for clean up of the property or closure of a waste management site. No environmental covenant is effective without the relevant agency signature. The interest is created in a specific instrument for the purpose. The instrument recites the controls and remediation requirements imposed upon the property. The rights under the covenant must be granted to a party or parties called the holders. The covenant is perpetual unless limited in time within the instrument. It runs with the land and does not have to be "appurtenant." This means it cannot be extinguished when one owner transfers rights or interests in the property to another, no matter who the holders are.

Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be recorded in the land records and effectively enforced over time as a valid real property servitude. This Act reverses the variety of common law doctrines that cast doubt on such enforceability.

A second important policy served by this Act is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use. Large numbers of contaminated sites, often known as brownfields, are unlikely to be successfully recycled until regulators, owners, responsible parties, affected communities, and prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these instruments which will appear in any title abstract for the property in question.

At the time this Act was promulgated, approximately half the states had laws providing for land use restrictions in some real estate form pertaining to environmental contamination. Those existing laws

vary greatly in scope – some simply note the need for land use restrictions, while others create tools similar to many of the legal structures envisioned by this Act. Most such acts apply only to cleanups under a state program. In contrast, this Act includes a number of provisions absent from most existing state laws, including the Act's applicability to both federal and state-led cleanups. It ensures that a covenant will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. The Act also provides detailed provisions regarding termination and amendment of covenants, and includes important provisions on dealing with recorded interests that have priority over the new covenant. There is broad enforcement authority to make sure a covenant does govern the property. Holders are expected to enforce, but any party to the covenant and appropriate agencies may enforce as well. Further, the Act offers guidance to courts confronted with a proceeding that seeks to terminate such a covenant through eminent domain or the doctrine of changed circumstances.

Under the Uniform Act, the governmental regulators who sign an environmental covenant will serve to ensure that the risk assessments and control mechanisms are based on sound science and that affected third parties have notice of the covenant and associated controls. The act specifies that persons with a recorded interest in the property or who are in possession of the property, together with local governments in which the property is located and any other person the agencies require, must be given notice of the covenant. Environmental covenants, and any associated amendments or terminations, must be recorded in the local land records.

It is important to note that Act does not supplant or impose substantive clean-up standards, either generally or in a particular case. The Act assumes those standards will be developed in the prior regulatory process. Rather, the Act validates site-specific, environmental use restrictions that result from the environmental response project which an environmental covenant helps implement. Implicit in use controls is the fact that, despite best efforts, total cleanups of many contaminated sites are not possible, but property may be put to limited uses without risk to others, nonetheless. The Act also does not affect the liability of principally responsible parties for the cleanup or any harm caused to third parties by the contamination – rather it provides a method for minimizing the exposure of third parties to such risks and for owners and responsible parties to engage in long-term cleanup mechanisms.

The Uniform Environmental Covenants Act is an important tool in revitalizing inner cities and other areas where vacant and underused properties are preventing vital redevelopment and economic expansion. It was drafted with the active participation of federal and state environmental regulators, public and private land holders, banking interests, environmentalists, and land use experts. Its uniform enactment nationwide will provide owners, especially owners with properties in multiple states, with the confidence to engage in long-term remediation strategies and use controls, and bring economic growth back to blighted sites and areas.

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Why States Should Adopt UECA

The **Uniform Environmental Covenants Act (UECA)**, drafted and approved by the National Conference of Commissioners on Uniform State Laws in 2003, allows for the long-term enforcement of clean-up controls (restrictions on certain uses, prohibitions on using wells, protection of concrete “caps”, maintenance of monitoring equipment, etc.) to be contained in a statutorily-defined agreement known as an “environmental covenant” which will be binding on subsequent purchasers of the property and be listed in the local land records. The fundamental purpose of this act is to remove various legal impediments to the use of such restrictions and to thereby lessen liability concerns of sellers and lenders associated with the redevelopment and sale of “brownfields” while at the same time requiring state approval of the remediation and control plan as well as notice to surrounding landowners, local governments, and other parties in interest. By ensuring such “institutional controls” are maintained and enforced, UECA helps fulfill the dual purposes of such restrictions – the protection of human health and the economically viable reuse of the property in question.

There are many reasons why every state should adopt the **Uniform Environmental Covenants Act**.

- UECA helps to return previously contaminated property to the stream of commerce, by allowing the owners of that property to engage in responsible risk-based cleanups and then transfer or sell the property subject to state-approved controls on its use.
- UECA gives a broad array of interested parties the ability to enforce the use and activity restrictions contained in an environmental covenant, thereby helping to ensure those controls will remain in place and prevent secondary harms.
- UECA protects valid environmental covenants from being inadvertently extinguished by application of various common law doctrines, adverse possession, tax lien foreclosures, less-restrictive zoning changes, and marketable title statutes.
- UECA requires the state environmental agency to be a signatory to the covenant, thereby ensuring that risk assessments and control mechanisms are based on sound science, adequately protect human health and surrounding properties, and that notice of the covenant and associated controls is provided to affected third parties.
- UECA does not supplant or impose substantive cleanup standards or liability; rather it validates approved site-specific controls resulting from an environmental response project, and makes sure those controls are maintained as long as necessary to meet the objective for which they were approved.

The **Uniform Environmental Covenants Act** is an important tool in revitalizing inner cities and other areas where vacant and underused properties are preventing vital redevelopment. It was drafted with the participation of state and federal regulators, public and private land owners, banking interests, environmentalists, and land use experts. Its uniform national enactment will provide the owners of contaminated land the confidence to invest in long-term remediation strategies and use controls, while at the same time protecting human health and allowing those properties to be developed and thus bring economic revitalization to blighted areas and sites.